Looh Keo @ Looh Lim Teng & Anor v Prospell Enterprise Sdn Bhd & Ors

KUALA LUMPUR (HIGH COURT) — ORIGINATING SUMMONS NO WA-24NCC-657–05 OF 2022
ATAN MUSTAFFA J
17 MARCH 2023

Companies and Corporations — Inspection of documents — Member of company denied access to accounts and documents — Application for inspection of company records by director — Types of documents for inspection — Whether application for inspection was for ulterior motive — Whether application for inspection could cause harm to company — Whether application for inspection was made in best interest of company – Whether agents authorised by director had right to inspect documents — Whether director's right to inspect documents limited to documents listed in intitulement — Companies Act 2016 ss 48, 55, 57, 245 & 342 — Companies Act 1965 (repealed) s 167

The first plaintiff was the director of the first to sixth defendants ('the company defendants/companies') whereas the seventh to eleventh defendants ('the individual defendants') were the first plaintiff's children from his second marriage and third marriage who held shares and had directorship in the companies. The first plaintiff had appointed the second plaintiff, who was his eldest son from his first marriage, as his attorney. The plaintiffs had initiated Suit 112 against the individual defendants claiming that the shares held by his children and brother in the companies were held on trust for his benefits. The plaintiffs then filed the present originating summons ('encl 1') against the defendants for orders for the inspection of the companies' records in accordance with the Companies Act 2016 ('the CA 2016') and to restrain the defendants from obstructing the inspection. The first plaintiff had nominated the second plaintiff (as his attorney), Ms Hee Cher Sun (an advocate and solicitor), and Mr Chuah Soo Huat (an approved company auditor) to assist him with the inspection of the documents of the companies ('the third parties'). In opposing encl 1, the company defendants submitted that: (a) the first plaintiff, as the director of the companies, had the right to inspect and copy the corporate information and documents of the companies but not the third parties; (b) the second plaintiff was improperly joined as a plaintiff and had no right to bring the action; (c) the first plaintiff breached his fiduciary duty by authorising the third parties to access the documents for an improper purpose and not in the best interests of the defendants; (d) the first plaintiff had neglected to attend Board of Directors' meetings and his unprofessional conduct resulted in the resignation of the company secretary; and (e) the first plaintiff's conduct was detrimental to the defendants. As for the individual

defendants, they opposed encl 1 on the ground that the inspection sought by the first plaintiff was for an ulterior purpose not intended to enable him to discharge his duty as director but was instead a tactical move to advance the plaintiffs' personal claims against the individual defendants in Suit 112.

Held, allowing encl 1 with costs of RM25,000 to be paid by the company defendants and RM25,000 to be paid by the individual defendants:

(1) The court found that the company defendants had failed to discharge their burden to show that the inspection of documents by the first plaintiff was for an ulterior motive and would cause harm to the companies. The grounds relied upon by the company defendants to oppose this application did not point to any potential ulterior motive on the part of the first plaintiff. The court did not see any valid reasons for why the right to inspection would be misused or cause harm to the companies. Even if there was a possibility of misuse or abuse, the law did not allow the right of inspection to be denied or limited on that basis. The presumption that the inspection by the first plaintiff through his agents was made in the best interest of the company defendants and in proper discharge of the director's duties was not rebutted by the defendants. Even if the first plaintiff derived some advantage from the inspection of the documents of the company defendants that was applied in Suit 112, the right of inspection was not taken away from the first plaintiff. This was because, if the first plaintiff was able to prove his case in Suit 112, the consequence would be a change of the shareholding, and there was no detriment to any of the companies (see paras 36, 38, 41, 45 & 75).

(2) The common law right of inspection for directors was not limited or restricted by the language of s 245 of the CA 2016. The court agreed with the plaintiffs that the first plaintiff's right to inspect the companies' records was fundamentally a common law right and the statutory provisions providing for a director's right of inspection under the CA 2016 was adjunct and/or supplementary to the right of inspection under common law and did not diminish or derogate from the common law position. Based on the common law position, if a director had a right of inspection, equally his authorised agents ought to be accorded same right. Therefore, the third parties could be conferred the right to inspect. In view of the first plaintiff's illiteracy and multiple health issues, his right of inspection could only be effectively exercised though his agents which was necessary to enforce those rights (see paras 51–52, 62–63, 73 & 75).

(3) As for the documents that could be inspected, these were not limited to only documents or records which were within the purview of ss 48, 55, 57, 245 and 342 of the CA 2016 stated in the intitulement. Following the case of *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2018] 8 MLJ 394, the information and documents which a director was

A entitled to inspect may potentially be everything in the records of the company and beyond accounting and other records as envisaged under s 167 of the Companies Act 1965, the precursor to the current s 245 of the CA 2016 (see para 77).

B **[Bahasa Malaysia summary**

Plaintif pertama adalah pengarah defendan pertama hingga keenam ('defendan-defendan syarikat/syarikat-syarikat tersebut') manakala defendan ketujuh hingga kesebelas ('defendan-defendan individu') adalah anak-anak plaintif pertama daripada perkahwinan keduanya dan perkahwinan ketiganya
C yang masing-masing memegang saham dan mempunyai jawatan pengarah dalam syarikat-syarikat tersebut. Plaintif pertama telah melantik plaintif kedua, yang merupakan anak sulungnya daripada perkahwinan pertamanya, sebagai wakilnya. Plaintif-plaintif telah memfailkan Saman 112 terhadap defendan-defendan individu atas dakwaan bahawa saham yang dipegang oleh
D anak-anak dan abangnya dalam syarikat-syarikat tersebut dipegang atas amanah untuk kepentingannya. Plaintif-plaintif kemudiannya memfailkan saman pemula ('lampiran 1') terhadap defendan-defendan untuk mendapatkan perintah untuk pemeriksaan rekod-rekod syarikat mengikut Akta Syarikat 2016 ('AS 2016') dan untuk menghalang defendan-defendan
E daripada menghalang pemeriksaan tersebut. Plaintif pertama telah mencalonkan plaintif kedua (sebagai wakilnya), Cik Hee Cher Sun (seorang peguam bela dan peguam cara), dan Encik Chuah Soo Huat (seorang juruaudit syarikat yang berdaftar) untuk membantunya dengan pemeriksaan dokumen syarikat-syarikat tersebut ('pihak-pihak ketiga'). Dalam menentang lampiran
F 1, defendan-defendan syarikat berhujah bahawa: (a) plaintif pertama, sebagai pengarah syarikat, mempunyai hak untuk memeriksa dan menyalin maklumat korporat dan dokumen-dokumen bagi syarikat-syarikat tersebut tetapi bukan pihak-pihak ketiga; (b) plaintif kedua telah dimasukkan secara tidak wajar sebagai plaintif dan tidak mempunyai hak untuk membawa tindakan tersebut;
G (c) plaintif pertama melanggar kewajipan fidusiarinya dengan memberi kuasa kepada pihak-pihak ketiga tersebut untuk mengakses dokumen-dokumen tersebut untuk tujuan yang tidak wajar dan bukan demi kepentingan defendan-defendan; (d) plaintif pertama telah mengabaikan untuk menghadiri mesyuarat Lembaga Pengarah dan kelakuannya yang tidak profesional
H mengakibatkan peletakan jawatan setiausaha syarikat; dan (e) kelakuan plaintif pertama memudaratkan defendan-defendan. Bagi defendan-defendan individu, mereka menentang lampiran 1 atas alasan bahawa pemeriksaan yang dimohon oleh plaintif pertama adalah untuk tujuan tersembunyi yang tidak bertujuan untuk membolehkannya menunaikan kewajipannya sebagai
I pengarah tetapi sebaliknya merupakan langkah taktikal untuk meneruskan tuntutan peribadi plaintif-plaintif terhadap defendan-defendan individu dalam Saman 112.

Diputuskan, membenarkan lampiran 1 dengan kos sebanyak RM25,000

dibayar oleh defendan-defendan syarikat dan RM25,000 dibayar oleh defendan-defendan individu:

(1) Mahkamah mendapati bahawa defendan-defendan syarikat telah gagal menunaikan beban mereka untuk menunjukkan bahawa pemeriksaan dokumen oleh plaintif pertama adalah untuk motif tersembunyi dan akan menyebabkan kemudaratan kepada syarikat-syarikat tersebut. Alasan yang disandarkan oleh defendan-defendan syarikat untuk menentang permohonan ini tidak menunjukkan apa-apa potensi motif tersembunyi di pihak plaintif pertama. Mahkamah tidak melihat apa-apa alasan yang sah mengapa hak untuk pemeriksaan akan disalahgunakan atau menyebabkan kemudaratan kepada syarikat-syarikat tersebut. Walaupun terdapat kemungkinan penyelewengan atau penyalahgunaan, undang-undang tidak membenarkan hak pemeriksaan dinafikan atau dihadkan atas dasar tersebut. Anggapan bahawa pemeriksaan oleh plaintif pertama melalui ejennya dibuat demi kepentingan defendan-defendan syarikat dan dalam melaksanakan tugas pengarah dengan sewajarnya tidak disangkal oleh defendan-defendan. Walaupun plaintif pertama memperoleh beberapa kelebihan daripada pemeriksaan dokumen ke atas defendan-defendan syarikat yang digunakan dalam Saman 112, namun, hak untuk melakukakan pemeriksaan tidak diambil daripada plaintif pertama. Ini kerana, jika plaintif pertama dapat membuktikan kesnya dalam Saman 112, akibatnya ialah perubahan pegangan saham, dan tidak ada kerugian kepada syarikat-syarikat tersebut (lihat perenggan 36, 38, 41, 45 & 75).

(2) Hak pemeriksaan di bawah undang-undang biasa untuk pengarah tidak terhad atau dihadkan oleh bahasa s 245 AS 2016. Mahkamah bersetuju dengan plaintif-plaintif bahawa hak plaintif pertama untuk memeriksa rekod syarikat pada asasnya adalah hak undang-undang biasa dan peruntukan berkanun yang memperuntukkan hak pemeriksaan pengarah di bawah AS 2016 adalah iringan dan/atau tambahan kepada hak pemeriksaan di bawah undang-undang biasa dan tidak mengurangkan atau merendahkan kedudukan undang-undang biasa. Berdasarkan kedudukan undang-undang biasa, jika pengarah mempunyai hak pemeriksaan, ejen-ejen yang diberi kuasanya juga harus diberikan hak yang sama. Oleh itu, pihak-pihak ketiga tersebut boleh diberikan hak untuk memeriksa. Mengambil kira bahawa plaintif pertama buta huruf dan pelbagai isu kesihatan yang dialaminya, hak pemeriksaannya hanya boleh dilaksanakan dengan berkesan melalui ejen-ejennya yang diperlukan untuk menguatkuasakan hak tersebut (lihat perenggan 51–52, 62–63, 73 & 75).

(3) Berkaitan dengan dokumen-dokumen yang boleh diperiksa, ini tidak terhad kepada hanya dokumen-dokumen atau rekod-rekod yang berada dalam bidang kuasa ss 48, 55, 57, 245 dan 342 AS 2016 yang dinyatakan

dalam tajuk tindakan. Mengikut kes *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2018] 8 MLJ 394, maklumat dan dokumen-dokumen yang berhak diperiksa oleh pengarah berkemungkinan merupakan segala-galanya yang berada dalam rekod-rekod syarikat dan di luar perakaunan dan rekod-rekod lain seperti yang ditetapkan di bawah s 167 Akta Syarikat 1965, pelopor kepada s 245 AS 2016 semasa (lihat perenggan 77).]

Cases referred to

Arthur v Bokenham (1708) 11 Mod 150 (refd)
Bevan v Webb [1901] 2 Ch 59, CA (folld)
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457, CA (refd)
Credit Company, In Re (1879) 11 Ch D 256, Ch D (refd)
Dato' Tan Kim Hor & Ors vTan Chong Consolidated Sdn Bhd [2009] 2 MLJ 527, CA (refd)
Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2018] 8 MLJ 394, HC (folld)
Edman v Ross [1922] 22 SR (NSW) 351 (refd)
Kwan Teck Hian v Insulflex Corporation Sdn Bhd [2017] MLJU 1300; [2018] 2 CLJ 335, HC (refd)
Low Ean Nee v SNE Marketing Sdn Bhd [2022] MLJU 1002, HC (refd)
Mirza Mohamed Tariq Beg Mirza HH Beg v Perunding Pakarmedia Sdn Bhd [2009] 10 CLJ 273, HC (refd)
The State of South Australia and Anor v Barrett and Ors [1995] 180 LSJS 171, SC (refd)
Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12 MLJ 1, FC (refd)
Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors [1989] 1 MLJ 252, HC (refd)
Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors and Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors (Dato' Jeyaraj a/l V Ratnaswamy, intervener) [2017] MLJU 2047, HC (refd)
Welch & Anor v Brittania Industries Pte Ltd [1992] 3 SLR(R) 64, HC (refd)
Wuu Khek Chiang George v ECRC Land Pte Ltd [1999] 3 SLR 65, CA (refd)

Legislation referred to

Companies Act 1862 [UK]
Companies Act 1965 (repealed by Companies Act 2016) s 167, 167(6)
Companies Act 2016 ss 47, 48, 50, 55, 57, 213(1), 245, 245(1), (3), (4), (8), (9), 341, 342, 347(3), 585
Rules of Court 2012 O 24

Gopal Sreevenasan (with Robert Low, Karen Yong, Chong Lip Yi and Michelle Chew) (Ranjit Ooi & Robert Low) for the plaintiff.

Rishwant Singh (Cecil Abraham & Partners) for the first, second, third, fourth, fifth and sixth defendants.
Andrew Chiew (with Lim Jun Xian) (Lee Hishamuddin Allen & Gledhill) for the seventh, eighth, ninth, tenth and 11th defendants.

Atan Mustaffa J:

INTRODUCTION

[1] This originating summons in encl 1 was filed by the plaintiffs against the respective defendants for orders for the inspection of company records of the first to sixth defendants in accordance with the Companies Act 2016 and to restrain the defendants from obstructing the inspection.

[2] After having read the cause papers, considered the submissions and heard oral arguments of the parties, I allowed the application. This judgment contains the grounds for my decision.

BACKGROUND FACTS

[3] The first plaintiff, who has three wives following the law, religion, custom and usage, has nine children from his three marriages, including the second plaintiff who is is the eldest son from the first plaintiff's first marriage to his first wife. The first plaintiff appointed the second plaintiff as his attorney via a power of attorney dated 2 April 2022. The first plaintiff was 80 years old when this action was filed in May 2022 and has various health issues, including the need for routine dialysis and a history of open-heart surgery. He is illiterate in English.

[4] The first to sixth defendants ('the company defendants') are six private limited companies which the first plaintiff founded or acquired. The first plaintiff is a director of all the company defendants and is a shareholder of the first defendant and third defendant. The seventh to 11th defendants ('the individual defendants') are the children of the first plaintiff from his second and third wives who hold shares and have directorships in the company defendants in various combinations.

[5] The first plaintiff filed Suit WA-22NCC-112–03 of 2022 ('Suit 112') on 18 March 2022, to assert his rights over shares in the company defendants held in the names of his children and brother. In this suit it was the contention of the first plaintiff that because he is not involved in the day-to-day operation and management of the companies due to his advanced age and physical health condition, the shares in the companies are held in the names of his children and brother on trust, whether express, resulting or constructive, for and on his

behalf. The value of the shares he seeks to recover is approximately RM400m. The claim is one for recovery of these assets as well as the taking of an account. The individual defendants deny this trust's existence, leading to the filing of Suit 112 by the first plaintiff and the second plaintiff in the Kuala Lumpur High Court against the individual defendants.

[6] The first plaintiff, through his solicitors, requested to inspect the records of the defendants, including secretarial and financial records. However, access to the records has been denied.

[7] The plaintiffs filed this originating summons (encl 1) on 11 May 2022 against the company defendants, seeking inspection of the companies' register, minutes book, accounting, and other documents/records. Subsequently, on 30 May 2022, the individual defendants filed an application to intervene in the originating summons and to be added as defendants. The court allowed this application on 31 May 2022, permitting the individual defendants to intervene and join as defendants in the case.

RELIEFS SOUGHT IN THE ENCL 1

[8] The main reliefs prayed by the plaintiffs are set out verbatim from encl 1:

> 1. That all records of each and every of the defendants (the company defendants) respectively, including the register, minutes book, accounting and other documents/records required to be kept pursuant to the Companies Act 2016, including but not limited to, sections 47, 50, 57, 245 and 341 thereof (whether in physical or electronic form) ('Records') be immediately and at all times:-
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> 1.1 open to inspection by the following persons:-
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> i. first plaintiff; and/or
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> ii. the second plaintiff (as the first plaintiff's attorney); and/or
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> iii. Hee Cher Sun, (NRIC No. 720101–10–5510) (Bar Council Membership No. BC/H/295) ('Solicitor HCS'), an advocate and solicitor of the High Court of Malaya practicing in Messrs CS Hee & Co acting for the first plaintiff; and/or
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> iv. The Solicitor HCS's colleagues from Messrs CS Hee & Co; and/or
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> v. Chuah Soo Huat, (NRIC No. 750914–14–5461) (Audit License No. 03002/07/2022 J)] ('Auditor'), an approved company auditor and a partner of Messrs Moore Stephens Associates PLT, acting for the first plaintiff; and/or
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> vi. the Auditor's colleagues from Messrs Moore Stephens Associates PLT,
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> (collectively, 'Authorised Persons'); and

1.2 available for the Authorised Persons to make copies of and/or take extracts from the Records of each and every of the defendants respectively upon the undertaking in writing given by the second plaintiff, the Solicitor HCS and the Auditor to this Honourable Court that the information acquired by them and/or their colleagues from Messrs CS. Hee & Co and/or Messrs Moore Stephens Associates PLT respectively during the inspection shall not be disclosed by them and/or their colleagues from Messrs CS. Hee & Co and/or Messrs Moore Stephens Associates PLT respectively except to the first plaintiff, as per Annexure A hereto.

2. That each and every of the defendants respectively, whether by themselves, their directors, officers, agents, servants, nominees, proxy or otherwise howsoever be restrained and an injunction do issue to restrain each and every of the defendants respectively whether by themselves, their directors, officers, agents, servants, nominees, proxy or otherwise howsoever from preventing and/or obstructing in any manner whatsoever the Authorised Persons from accessing the Records of each and every of the defendants respectively.

[9] Put simply, the plaintiffs' application is for orders to inspect and copy the records of each of the company defendants in accordance with the Companies Act 2016, and to restrain the company defendants from preventing or obstructing the inspection.

[10] The first plaintiff has nominated the following individuals to assist with the inspection of the documents of the company defendants:

(a) the second plaintiff as the first plaintiff's attorney;

(b) Ms Hee Cher Sun ('Ms Hee'), an advocate and solicitor of the High Court of Malaya practicing in Messrs CS Hee & Co, as the first plaintiff's solicitor; and

(c) Mr Chuah Soo Huat ('Mr Chuah'), an approved company auditor and partner from Messrs Moore Stephen Associates PLT, as the first plaintiff's auditor.

THE DEFENDANTS' GROUNDS OF OPPOSITION

[11] The company defendants' grounds of opposition to encl 1 are summarised as follows:

(a) the first plaintiff, as director of the company defendants, has the right to inspect and copy the corporate information and documents of the company defendants but not third parties, such as Messrs CS Hee & Co;

(b) the second plaintiff is improperly joined as a plaintiff and has no right to bring the action;

(c) the first plaintiff breached his fiduciary duty by authorising third parties to access the documents for an improper purpose and not in the best interests of the defendants;

(d) the first plaintiff has neglected to attend Board of Directors' meetings and his unprofessional conduct resulted in the resignation of the company secretary; and

(e) the first plaintiff's conduct is detrimental to the defendants.

[12] The individual defendants oppose encl 1 on the ground that the inspection sought by the first plaintiff is for an ulterior purpose not intended to enable him to discharge his duty as director, but is instead a tactical move to advance the plaintiffs' personal claims against the individual defendants in Suit 112.

THE LAW ON A DIRECTOR'S RIGHT TO INSPECT DOCUMENTS

[13] The key legislative provisions governing requirements relating to the inspection rights of company documents by its own directors are found in s 245 of the Companies Act 2016 which mandates that every company, its directors, and managers maintain accounting and other records. These records must be kept for seven years and should be accessible to directors for inspection. The court may order an auditor to inspect the records on behalf of a director, with restrictions on disclosure. Non-compliance with this section can result in hefty fines or imprisonment for the company and its officers. The specific provisions of s 245 of the Companies Act 2016 are reproduced below.

[14] Section 245(1) of the Companies Act 2016:

> (1) A company, the directors and managers of a company shall:
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> (a) cause to be kept the accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared; and
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> (b) (b) cause the accounting and other records to be kept in a manner as to enable the accounting and other records to be conveniently and properly audited.

[15] Section 245(3) of the Companies Act 2016:

> Accounts to be kept
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> ...
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> (3) The company shall retain the records referred to in subsection (1) for seven years after the completion of the transactions or operations to which the entries relate.

[16] Section 245(4) of the Companies Act 2016:

> (4) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open for inspection by the directors.

[17] Section 245(8) of the Companies Act 2016:

> (8) The Court may, in any particular case, order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, subject to a written undertaking given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

[18] Section 245(9) of the Companies Act 2016:

> (9) The company and every officer who contravenes this section commit an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[19] Section 167 of the Companies Act 1965, the predecessor of s 245 of the Companies Act 2016 contains similar provisions, with the main difference being the penalties. Hence, when interpreting matters that are subject to Companies Act 2016, cases applying s 167 of the Companies Act 1965, particularly local decisions, some of which will be cited here, would continue to be of direct relevance.

[20] The right of a company director to inspect its accounting and other records is an absolute right at common law, recognised by legislation. This right stems from the fiduciary duties of good faith, care, skill, and diligence that a director owes to the company. As long as the right is exercised for the proper performance of a director's duties and not to cause detriment to the company, it is considered absolute. The court has no residual discretion to refuse inspection, and it can only bar a director from exercising this right if the director intends to use the information for ulterior purposes that would harm the company. This right exists to enable directors to perform their duties and will be lost if it is exercised to advance ulterior motives or injure the company.

[21] The above was set out in the leading authority of the Court of Appeal in *Dato' Tan Kim Hor & Ors vTan Chong Consolidated Sdn Bhd* [2009] 2 MLJ 527. Low Hop Bing JCA delivered the judgment referring to the common law and cited with approval a leading Singapore Court of Appeal authority, *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 as follows:

> [16] The relevant established principles have been succinctly stated by the Singapore Court of Appeal in *Wuu Khek Chiang George*. There, the appellant, a director of the respondent, took out an application under s 199 of the Singapore

Companies Act (equipollent to our s 167) for an order requiring the respondent to inspect its accounting and financial records. The High Court judge dismissed the application. After reviewing a long line of authorities, the Court of Appeal allowed the appellant's appeal and held, inter alia, that:

> (1) the right of a director of a company to inspect its accounting and other records is a right existing at common law and is recognised in s 199 of the Companies Act. Such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. *The obligation of the company to allow inspection by its director is mandatory*.
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> (2) *This right has been described as being 'absolute'. A director is prima facie entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis*: *Molomby*. So long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company, it is in that sense 'absolute': see eg *Dato' Aw Kow v Haw Par Bros (Pte) Ltd* [1972] 2 MLJ 225; [1972] 1 LNS 25; [1972-1974] SLR 391, *Haw Par Brothers v Dato Aw Kow* [1973] 2 MLJ 169; [1973] 1 LNS 44; [1972-1974] SLR 183 *Leong Sun Wing v Wah Hup Engineering Works Sdn Bhd (No 2)* [1977] CSLR VII [1003] *Molomby; Welch & Anor v Britannia Industries Pte Ltd* [1993] 1 SLR 673 *Edman v Ross* (1922) 22 SR (NSW) 351 and *Conway & Ors v Petronius Clothing Co Ltd & Ors* [1978] 1 All ER 185; [1978] 1 WLR 72;
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> (3) *There is no residual discretion in the court to refuse inspection. Where the court bars a director from exercising his right of inspection, it is not in fact exercising a residual discretion, but is in such an event satisfied on the basis of the evidence before it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 per Mahon J;
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> (4) *The right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director*. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but some other ulterior purpose to injure the company: *Edman v Ross*, *Molomby; Deluge Holdings Pty Ltd & Anor v Bowlay& Ors* [1991] 9 ACLC 1486 *Welch & Anor; Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668 and *Paul Nicholson lwn. Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 5 CLJ 383; [2002] 1 MLJ 355.

...

[28] In our view, s 167(6) is intended to facilitate and liberalise, and is not meant to impede, the right of inspection. Indeed, almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection. Clearly, it is within the powers of the court to allow the plaintiffs to furnish a fresh undertaking by the auditor in terms as required by the court, by addressing it to the court and by deleting therefrom the words relating to the appointed servants/agents. This is especially so after the learned judge had arrived at a specific decision that the defendant had, in the first instance, failed to discharge its burden to show that the

plaintiffs' inspection would result in any detriment to the interests of the defendant. That is a reaffirmation that the right of inspection by the plaintiffs as directors of the defendants pursuant to s 167(6) is 'absolute'. (Emphasis added.)

[22] In *Wuu Khek Chiang George*, LP Thean JA stated:

[33] The right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director, including the duty to ensure that the company complies with the requirements as to accounts set out in the Companies Act: see s 204(1) of the Act. Such right is an important one, as the books and records of a company are a primary, and sometimes the only, source of information as to the state of affairs of a company. It follows that unless a director has access to these sources of information, he would be severely inhibited in the proper performance of his duties. So long, therefore, as such right is exercised for that purpose and not with a view to causing any detriment to the company, the right to inspect is 'absolute'. In this sense and to that extent, the right may be termed 'absolute'. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose or to injure the company: *Edman v Ross* at p 361, *Molomby v Whitehead* at p 292, *Deluge Holdings Pty Ltd & Anor v Bowlay & Ors* (1991) 9 ACLC 1 486 and *Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668.

[23] The burden of proof lies on the person asserting that a director's right to inspect is being exercised for an improper purpose. A director does not need to show a specific reason for the inspection request, as it is typically assumed to be for proper purposes. It is the responsibility of those opposing the director's right to provide clear proof and convince the court that granting the right of inspection would be detrimental to the company's interests. They must show a real ground for potential abuse and that substantial harm would be caused to the company.

[24] In *Wuu Khek Chiang George*, LP Thean JA stated:

[34] *The onus of establishing that the right is being, or will be, exercised for an improper purpose lies on the person who asserts it*: per Isaacs J in *Australian Metropolitan Life Assurance Co Ltd v Ure & Ors* (1923) 33 CLR 199 219. *There is no burden on a director to show any particular reason for his request for inspection — this will ordinarily be assumed:* see *Molomby v Whitehead* at p 293. It is for those who oppose the director's right to inspect to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company. *There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby*. (Emphasis added.)

[25] In *Tan Kim Hor*, Low Hop Bing JCA, approving *Wuu Khek Chiang George* stated:

A [9] It is settled law that the defendant, having resisted the plaintiffs' right to inspect the accounting and other records of the defendant, bears the burden of proving that the plaintiffs' right is being, or will be, exercised for an improper purpose: *Australian Metropolitan Life Assurance Co Ltd v Ure & Ors* (1923) 33 CLR 199, per Isaacs J; and *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 Companies B Act, per LP Thean JA.

[10] It is for the defendant to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company C thereby: *Wuu Khek Chiang George*.

FINDINGS AND ANALYSIS OF THE COURT

D *Inspection of documents for improper purpose and/or to the detriment of the defendants*

[26] The company defendants argue that the first plaintiff exercised his statutory right as a director of the companies for an improper purpose and/or to the detriment of the companies. They point to several instances of the first E plaintiff's alleged misconduct, including failing to provide reasons for requesting documents, authorising a third party to inspect the documents, not attending board meetings to discuss requests, and issuing unreasonable threats to the company secretary. The company defendants contend that this conduct constitutes a breach of the first plaintiff's fiduciary duty as a director to always F act in the best interest of the defendants and demonstrates an ulterior motive. Therefore, the first plaintiff is not entitled to inspect the companies' documents as a director of the company defendants.

G **[27]** The company defendants further allege that the first plaintiff's solicitor, Ms Hee, engaged in unprofessional conduct that led to the resignation of the first defendant's company secretary, Ms Teo as well as the company secretaries of the second, fourth and sixth defendants. They also allege that Ms Hee's firm sent letters to Ms Teo threatening legal action and complaints to professional H bodies and authorities. The company defendants argued that these incidents demonstrate the plaintiffs' and their solicitors' unreasonable and unlawful demands and their disregard for the professionalism and duties of the Company Secretaries.

I **[28]** The company defendants referred the court to s 213(1) of the Companies Act 2016 which provides:

> 213(1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.

[29] In support of their submissions, the company defendants referred the court to the case of *Dato' Tan Kim Hor v Tan Chong Consolidated Sdn Bhd* for the proposition that a director's right to inspect records of a company cannot be exercised for an improper purpose and the inspection would be detrimental to the interests of the company defendants.

[30] The company defendants also referred the court to the case of *Kwan Teck Hian v Insulflex Corporation Sdn Bhd* [2017] MLJU 1300; [2018] 2 CLJ 335 (HC) which followed *Dato' Tan Kim Hor* for the proposition that a director's right to inspect a company's books and records is absolute but can be forfeited if exercised for an improper purpose.

[31] The individual defendants argued that the plaintiffs' application for inspection of the companies' records is motivated by an ulterior motive to advance their personal cause in Suit 112, which is unrelated to the first plaintiff's duties as directors or members of the companies. It is submitted that the right of inspection granted to directors is concomitant with their fiduciary duties to act in the best interests of the company, and it must not be used for personal gain. In addition to *Dato Tan Kim Hor* the individual defendants also cite *The State of South Australia and Anor v Barrett and Ors* [1995] 180 LSJS 171 (Supreme Court of South Australia) to support their argument that the right of inspection must be exercised for the benefit of the company and not for personal reasons.

[32] The individual defendants also point out that the plaintiffs' vague and imprecise allegations in Suit 112 about the shares held under an express trust raise serious questions about the true proponent of the litigation, which they suggest to be the second plaintiff. The individual defendants argue that the plaintiffs' application for inspection is intended to fish for evidence to patch up the imprecise and vague allegations in their statement of claim in Suit 112. It is further argued that the plaintiffs' application is intended to circumvent the usual pre-trial directions in Suit 112 and the criteria of relevance and materiality in applications for discovery and inspection under O 24 of the Rules of Court 2012.

[33] The individual defendants contended that the plaintiffs' application for inspection is an excuse to achieve outcomes that they cannot achieve in Suit 112, and it is not made in good faith. They cite the case of *Low Ean Nee v SNE Marketing Sdn Bhd* [2022] MLJU 1002 to support their argument that the court should not allow an order for inspection to be used for an ulterior purpose.

[34] The individual defendants argued that the plaintiffs have not demonstrated that their application for inspection is related to their duties as

directors or members of the companies. They also point out that the second plaintiff, who is not a director or member, has no locus to advance a claim here or in Suit 112.

[35] I do not accept the contentions and submissions of the company defendants and individual defendants above.

[36] Upon examining the affidavits filed by the company defendants, the court finds that the company defendants have failed to discharge their burden to show that the inspection of documents by the first plaintiff was for an ulterior motive and would cause harm to the companies. The company defendants have not provided any specific allegations to support their claim of ulterior motive, and the events they have alluded to ie the first plaintiff's authorising a third party other than himself to attend to the inspection on short notice, the first plaintiff's failing to attend the relevant board of directors' meetings of the second to sixth defendants and the first plaintiff's solicitor making unreasonable threats to the first defendant's company secretary do not point to any potential ulterior motive on the part of the first plaintiff. Furthermore, the alleged detriment to the companies is unsupported by evidence, and the complaints of the company defendants also do not point towards any detriment to the companies. As such, the company defendants' claim that the inspection was brought for an ulterior motive and would cause harm to the companies is unfounded, and the first plaintiff's right of inspection as a director should not be fettered or restricted.

[37] It is also significant that the company defendants failed to even specify what the first plaintiff's ulterior motive or improper purpose was. Nothing short of clear proof must be shown for the first plaintiff's absolute right to inspection to be restricted.

[38] In respect of the individual defendants, even if encl 1 was filed with the ulterior purpose of advancing Suit 112 and even if access to the company defendants' records may assist the first plaintiff in Suit 112, it cannot be said that any detriment or prejudice would befall the said companies. It is clear that Suit 112 is essentially a family dispute between the first plaintiff and the second plaintiff on one side and the individual defendants on the other, with the company defendants being nominal defendants. Assuming the first plaintiff is able to prove his case in Suit 112, the consequence will be a change of the shareholding, and there is no detriment to any of the companies. The opposition of the company defendants to the plaintiffs' application to inspect is nothing more than the individual defendants' efforts to further their personal causes to restrict the first plaintiff's exercise of his rights as a director.

[39] Although there is hostility between the first plaintiff and the individual defendants, it is clear that none of it is directed at the company defendants. Therefore, the exercise of the director's right of inspection is not for an improper purpose, and the court recognises that it is often the case that such hostility is the reason for an application such as encl 1 to be made in the first place. In *Mirza Mohamed Tariq Beg Mirza HH Beg v Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273, the court observed that just because there is a possibility of further litigation between parties in the company, it does not mean that a director should be precluded from exercising their rights of inspection as a director. The fact that the directors/shareholders of a company are embroiled in litigation illustrates the hostility between parties, but it does not *ipso facto* show that the exercise of the director's right of inspection would be for an improper purpose.

[40] The individual defendants also appear to advance the argument that it is sufficient for the inspection to be done for an ulterior purpose even if the effect will not be detrimental to the company defendants for the first plaintiff to be denied accesss to the documents. The ulterior purpose alluded to by the individual defendants here is the plaintiffs are using this application for inspection to fish for evidence to improve their statement of claim in Suit 112 and not for first plaintiff's exercise of his duties as a director of the company defendants.

[41] The law presumes that inspection by a director is made in the best interest of the company and in proper discharge of the director's duties and the burden is upon those who oppose the director's right to inspect to rebut the presumption by showing clear proof and to satisfy the court affirmatively that the grant of the right of inspection would be for the purpose which would be detrimental to the interest of the company. It was observed by Mohd Nazlan J (as His Lordship then was) in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2018] 8 MLJ 394 as follows:

> [88] *By virtue of holding the office of a director of a company, once the director makes a request under s 167 (s 245 under the Companies Act 2016) or the common law, which the director does not need to provide justification for, as the law presumes it to be made in the best interest of the company,* but which request is however declined by the company, a prima facie demonstration of the director's entitlement to the documents has been established. For in all cases of refusal, all that a director needs to demonstrate in order to enforce his inspection right is that he or she is a director of the company, that as a director, he or she has demanded inspection, and that the right has been refused.
>
> [89] *The burden then shifts to the company to rebut the presumption of the request being in the best interest of the company or made in the discharge of director's duties, by showing clear evidence of impropriety in the director's purpose or which is unrelated to the discharge of director's duties that could justify denial of inspection of the documents*,

and with it requests for copies of such documents, as well as the right to appoint an agent or auditor on behalf of the director to perform the inspection.

[90] There is no residual discretion on the part of the courts in evaluating an application for inspection. It is either the inspection is in the proper discharge of director's duties or it is not. *If it is the former, which is presumed in all cases, the exercise of the right of inspection must be allowed. If the latter, which must be borne out of clear proof of impropriety in relation to the request* (thus rebutting the presumption), inspection must be denied, because otherwise the court would be facilitating an abuse and breach of director's statutory and fiduciary duties, which the courts must never countenance. (Emphasis added.)

[42] There is effectively a presumption in favour of allowing the first plaintiff as director as well as his authorised representatives to inspect and make copies of documents of the company. This presumption has not been displaced by the defendants.

[43] Here, the first plaintiff, even if the inspection advances his cause in Suit 112, is exercising his right as a director to inspect the documents of the companies to know the exact state of affairs of the companies, including the changes in the shareholding of the companies. There is no reason why the first plaintiff cannot be said to be doing this in the exercise of his duties as a director.

[44] The inspections may assist the first plaintiff's claim against the individual defendants but as mentioned earlier, this is not detrimental to the companies in any way. It is quite clear that the individual defendants have an equally strong motive borne from Suit 112 to deny the first plaintiff access because if allowed this would arm the first plaintiff with documents that would work against them in Suit 112. Any harm befalling to the individual defendants due their personal causes being affected in Suit 112 is irrelevant for the purpose of this application.

[45] Further, the right of a director to inspect company documents cannot be denied or restricted based on the mere possibility of misuse or abuse of this right and the director can exercise this right even if there are allegations that the director is hostile, adverse or a competitor of the company, as long as the director continues to serve as a director of the company. This was further observed by Nazlan J in *Dato' Seri Timor Shah*:

[93] ... The *mere possibility of abuse or misuse of the right does not afford any ground for its denial or restriction*. A director retains this right of inspection (inclusive of the right to be supplied with copies of documents so inspected), despite mere allegations that he is hostile, adverse or a competitor of the corporation, for as long as he remains a director of the company.

[94] Without clear evidence to such effect, attempts to restrict such rights will not withstand judicial scrutiny. Otherwise, refusal of inspection and taking of copies

could lead to a corresponding dilution of accountability on the part of the directors, resulting in an unwarranted and dangerous inroad into the sacrosanct principle of directors' duty of management in company law. (Emphasis added.)

[46] In fact, a director is both entitled to and in some circumstances obliged to 'fish', consistent with the right of unrestricted access to the companies' documents and records for directors as decided by the courts.

[47] In *Dato' Tan Kim Hor v Tan Chong Consolidated Sdn Bhd*, Low Hop Bing JCA stated:

> [18] In relation to these statutory provisions, it is settled law that directors have unrestricted and direct access to such company information. The right of a director to inspect documents of a company is mandatory in order to enable a director to discharge his responsibilities fairly and equitably for the benefit of the company and the shareholders.

[48] This was similarly stated by Nazlan J in *Kwan Teck Hian v Insulflex Corporation Sdn Bhd* [2017] MLJU 1300.

Inspection by third parties: the second plaintiff, the first plaintff's solicitor and the first plaintiff's appointed auditor

[49] The company defendants object to encl 1, particularly to the prayers for the orders which allow the second plaintiff and the first plaintff's solicitor, Ms Hee, and the first plaintiff's appointed auditor to inspect the documents of the company defendants on the ground that the right to inspect the Documents does not extend to third parties. In this regard, the company defendants contended and submitted:

(a) the statutory right to inspect select company documents is only limited to members, directors and/or the company's auditor as provided in ss 57 and 245 of the Companies Act 2016;

(b) as the Companies Act 2016 does not give a right to a director or shareholder who intends to sue the company to obtain advance 'discovery' of the company's documents, the director's right of access does not extend to a director's appointed lawyer who makes unreasonable demands on the company secretary with the intention of litigating against the company and the company secretary;

(c) although the first plaintiff as a director of the company defendants may inspect, access and/or make copies of the corporate information and/or documents of the company defendants, personally from their offices or from the respective company secretaries, the first plaintiff elected not to do so;

(d) the first plaintiff is only a shareholder of the first defendant and third defendant, and not of the second, fourth, fifth and sixth defendants and is thus not entitled to inspect the documents of those companies in the capacity of a shareholder. Even for the first and third defendants, the first plaintiff's right of inspection is limited, and he cannot authorise third parties to inspect the documents;

(e) notwithstanding this, the first plaintiff proceeded to authorise a third party namely his solicitors ie, Messrs CS Hee & Co to inspect the records and information of the defendants without first obtaining relevant Board approval. In this respect, no justification was provided by the first plaintiff. Yet, the first plaintiff gave authorisation to his solicitors, Messrs CS Hee & Co, to inspect the records and information of the company defendants without obtaining relevant board approval, and no justification was given for this action;

(f) the first plaintiff authorised the second plaintiff, who has no demonstrable right or interest under the law, to inspect the company defendants' documents and records suggesting that the first plaintiff viewed the right to inspect as a personal right rather than one that should be exercised in the best interests of the company as a director with fiduciary duties;

(g) no such authorisation was given by the board of directors of the company defendants to the first plaintiff's representatives although under the articles of association a third party can only have the right of the director to inspect company records, books, or papers if authorised by the directors or the company in general meeting;

(h) the allegation made by the first plaintiff that he requires the assistance of third parties to analyse and study the records of the company defendants is unfounded because during his tenure as their director, he did not express any difficulty in studying the records of the company defendants;

(i) the second plaintiff is not a director or shareholder of the company defendants, and therefore has no right to inspect their records. Moreover, the second plaintiff is not entitled to file encl 1 as the first plaintiff's 'attorney' because the first plaintiff is already bringing encl 1 in his own name. As per *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252, a person authorised to sue on behalf of their principal must sue in the name of the principal;

(j) Ms Hee, as an advocate and solicitor, cannot inspect the records of the first to sixth defendants without the approval of the Board of Directors. The first plaintiff did not provide any justification for why the assistance of an advocate and solicitor is needed to inspect the accounts, books, or papers of the company defendants, suggesting that encl 1 is for the

ulterior purpose of fishing for evidence for Suit 112. Similarly, no justification was given for authorising Mr Chuah to inspect the records of the companies, and this sudden request is inconsistent with the first plaintiff's indifference in the management of the company defendants; and

(k) the plaintiffs have not provided clear reasons for their request to inspect the documents and records. The use of Messrs CS Hee & Co, naming a non-director (the second plaintiff), and the first plaintiff's lack of interest in attending meetings or conducting the inspection himself suggest an ulterior motive to fish for evidence to leverage in the Writ Action. This is not the purpose for which a director is granted the right to inspect a company's documents.

[50] As for the individual defendants, they argue that the principal relief sought in prayer [1] which is a request for inspection of all records of the company defendants, including registers, minute books, accounting and other documents required to be kept under the Companies Act 2016, by several individuals, including the first plaintiff, second plaintiff as attorney, the solicitor and his colleagues, an approved company auditor, and his colleagues is impermissible due to its width and breadth. In this regard, the individual defendants contended and submitted:

(a) the relief sought by the plaintiffs in prayer [1] exceeds what is permissible in law as it goes beyond the provisions cited in the intitulement. The plaintiffs had only invoked the right to inspect certain records under ss 48, 55, 57, 245 and 342 of the Companies Act 2016 in the intitulement, but the prayer sought to inspect all records of the company defendants, including but not limited to, ss 47, 50, 57, 245 and 341 of the Companies Act 2016 thereof beyond the provisions cited in the intitulement. The individual defendants argued that the plaintiffs cannot seek reliefs beyond those provisions without explicitly specifying them, relying on the case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 (CA);

(b) the second plaintiff, who is neither a director nor a member of the Companies, has no locus to apply for the reliefs under ss 245(8) and 585 of the Companies Act 2016. The second plaintiff not is entitled to make the application as an attorney of the first plaintiff because an attorney cannot bring an action in his own name. The cases of *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* and *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors (Dato' Jeyaraj a/l V Ratnaswamy, intervener)* [2017] MLJU 2047 are cited to support this argument. They establish that a person authorised to sue and suing under a power of attorney on behalf of his principal has to sue in the name of the principal, and the

conferment of powers to an attorney does not deprive the principal from carrying out the power himself;

(c) the relief sought under s 585 of the Companies Act 2016 which allows the court to order an officer or former officer of a company or any other person to perform an act, matter, or thing that they failed or omitted to do, as required or directed by the Act which includes allowing inspection of registers, minute books, or other documents is only available when a person has failed or omitted to do something required or directed by the Companies Act. The individual defendants contended that the plaintiffs' solicitors improperly demanded inspection of documents and financial records from the second defendant, fourth defendant and sixth defendant. The demand to inspect the documents of the other companies was declined on the ground that the purpose was to fish for evidence to bolster the plaintiffs' claims in Suit 112;

(d) prayer [1] seeks an order allowing non-members and non-directors to inspect and take copies of records under ss 55, 57, 245, and 342, which is impermissible. Section 585 only permits members to apply to the court to compel compliance with ss 55, 57 and 342, and does not allow non-members to carry out inspection. Additionally, s 245(8) allows only an approved company auditor acting for a director to inspect accounting and other records of a company. Therefore, the relief sought in prayer [1] is impermissible as it allows non-members and non- directors to inspect records under ss 55, 57, 245, and 342, which is not permitted by the Companies Act.

[51] The plaintiffs submitted that when it comes to the first plaintiff's right to inspect documents of the company defendants, as he is director of these companies, his right to inspection is fundamentally a common law right and the statutory provisions providing for a director's right of inspection under the Companies Act 2016 is adjunct and/or supplementary to the right of inspection under common law and do not diminish or derogate from the common law position. Applying the common law position, it is argued by the plaintiffs that if a director has a right of inspection, equally his authorised agents ought to be accorded same right, relying on *Bevan v Webb* [1901] 2 Ch 59 and *Edman v Ross* [1922] 22 SR (NSW) 351.

[52] I am inclined to agree with the plaintiffs.

[53] To begin, it is crucial to understand a director's right to inspect company documents under common law. The courts have judicially recognised a director's common law right to inspect company documents.

[54] In the case of *Mirza Mohamed Tarig Beg Mirza HH Beg v Perunding*

Pakarmedia Sdn Bhd, Nallini Pathmanaban JC (as Her Ladyship then was) held that s 167(6) of the Companies Act 1965 (predecessor to the present s 245 of the Companies Act 2016) right is adjunct to the wide scope of a director's right of inspection:

> *Given the wide scope of a director's right of inspection, and since s 167(6) is an adjunct to this right*, it does not follow that Mirza should be precluded from exercising his rights of inspection as a director simply because there is a possibility that future litigation may ensue from an inspection in furtherance of the ongoing hostility between the directors and shareholders of the company. (Emphasis added.)

[55] Nazlan J in the case of *Dato' Seri Timor* held that a director's right under s 167 of the Companies Act 1965 is an 'affirmation of a director's right already existing at common law'. His Lordship stated:

> *As such, a director's right under s 167 of the Companies Act to inspect the accounting records is an affirmation of a director's right already existing at common law.* A corollary of the absolute right to inspect must mean that the company is obliged to ensure that such common law and statutory right can be exercised by the director unimpeded. (Emphasis added.)

[56] In *Dato' Tan Kim Hor*, Low Hop Bing JCA held that s 167(6) of the Companies Act 1965 is intended to facilitate and liberalise, and is not meant to impede right of inspection and almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection. His Lordship stated:

> *In our view, s 167(6) is intended to facilitate and liberalise, and is not meant to impede, the right of inspection.* Indeed, almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection. Clearly, it is within the powers of the court to allow the plaintiffs to furnish a fresh undertaking by the auditor in terms as required by the court, by addressing it to the court and by deleting therefrom the words relating to the appointed servants/agents. This is especially so after the learned judge had arrived at a specific decision that the defendant had, in the first instance, failed to discharge its burden to show that the plaintiffs' inspection would result in any detriment to the interests of the defendant. *That is a reaffirmation that the right of inspection by the plaintiffs as directors of the defendants pursuant to s 167(6) is 'absolute'.* (Emphasis added.)

[57] In the Singapore case of *Welch & Anor v Brittania Industries Pte Ltd* [1992] 3 SLR(R) 64, Kan Ting Chiu JC, with reference to *Edman v Ross*, held that the Singapore statutory provisions governing directors' right of inspection (which are in pari materia to the Malaysian statutory provisions) are 'merely declaratory of the common law'. His Lordship stated:

> I do not think that the limits of the right can be ascertained by characterising it as a common law right or a statutory right. As the right originated under the common law before being embodied in a statutory form, the question is whether it has been modified in the process of enactment.

[58] In light of this judicial recognition, courts have frequently invoked common law to uphold a director's right of inspection under statute and to ensure that such statutory provisions are effective. For instance, although the provisions in the Companies Act 2016 do not explicitly provide for the directors' right to make copies of documents during inspection, case law has established that such a right exists. In *Dato' Seri Timor*, Nazlan J observed:

> [33] So, does the inspection right encompass the right to ask for copies of the documents? This has been answered in *Edman v Ross* (1922) 22 SR (NSW) 351 in the affirmative. This Australian case is a leading authority on the director's right in common law to inspect and take copies of the accounting records which in addition may be exercised personally or through his agent, such as his accountant ...
>
> [34] ... I cannot but hold that the right for copies is integral to and intertwined with the very concept of inspection right itself. Unlike the scope of shareholder's inspection rights, which is more restricted, it is a correct statement of law that in this country the right of a company director to inspect the corporate books and records and access all company information is virtually absolute ...

[59] It should be noted that the Companies Act 2016 does not explicitly remove or eliminate the common law right of inspection. If Parliament had intended to change or eliminate this right, they would have done so explicitly. For example, the elimination of the common law derivative action is expressly stated in s 347(3) of the Companies Act 2016. The passage from *Welch v Britannia* provides an informative example of this:

> I do not think that the limits of the right can be ascertained by characterizing it as a common law right or a statutory right. As the right originated under the common law before being embodied in a statutory form, the question is whether it has been modified in the process of enactment. It has been laid down as far back as *Arthur v Bokenham* [1708] 11 Mod Rep 148 by Trevor CJ that:
>
> > *The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare; therefore in all general matters the law presumes the Act did not intend to make any alteration: for if the Parliament had had that design, they would have expressed it in the Act.* (Emphasis added.)

[60] The Federal Court has endorsed the principle established in *Arthur v Bokenham* (1708) 11 Mod 150 as evidenced by its citation in the case of *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1.

[61] Given the above, the phrasing of s 245 of the Companies Act 2016 does not limit the common law right of inspection in any manner. This court is also allowed to use and enforce the common law position to implement the legal provisions that regulate a director's right of inspection.

[62] Considering the above, the common law right of inspection for directors is not limited or restricted by the language of s 245 of the Companies Act 2016. This means that directors have the freedom to rely on the pre-existing common law right of inspection in addition to the statutory provisions outlined in the Companies Act 2016. The court has the power to enforce and apply the common law right of inspection in conjunction with the relevant statutory provisions to ensure that directors are able to carry out their duties effectively. In essence, the common law right of inspection and the statutory provisions work hand in hand to provide directors with a robust framework that facilitates their ability to access and review relevant company records. Therefore, the court is not prevented from using and relying on the common law right of inspection to give effect to the statutory provisions that regulate directors' rights of inspection.

[63] Coming now to the question of whether the first plaintiff can exercise his rights of inspection through his authorised representatives, the second plaintiff, the first plaintff's solicitor and the first plaintiff's appointed auditor, I am of the view that these persons can be conferred the right to inspect.

[64] In *Bevan v Webb*, the English Court of Appeal held that a director's right of inspection may be carried out through agents of the director. This case involved 'sleeping partners' in a partnership who wished to appoint a solicitor to carry out an inspection of the partnership's books on their behalf. The key question was whether a partner's right to inspect partnership books could be exercised through an agent acting on behalf of the partner. The English Court of Appeal ruled unanimously that that a partner can inspect the partnership books through his agents whom no reasonable objection can be taken. The court acknowledged the importance of agents and their role in modern society, stating that anything that can be done by an individual can also be done by their agent. The use of agents is essential for trade, commerce, professional, and other pursuits, especially when conducting business in multiple locations, managing personal illness or infirmity, and ensuring accuracy, skill, ability, and speed in handling important matters that directly impact an individual's rights and interests. Stirling J stated:

> ... whatever a person who is sui juris can do personally, he can also do through his agent ... In the expanded intercourse of modern society it is easy to perceive, that the exigencies of trade and commerce, the urgent pressure of professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and assistance and labours of many persons, in addition to the immediate superintendence of him, whose rights and interests are to be directly affected by the results.

[65] Collins LJ in *Bevan v Webb*, after reviewing previous cases, held that the permission to inspect granted to an individual must be construed effectively to cover everything necessary to carry out the inspection, regardless of whether the case is related to a company or a partnership. The permission to inspect granted to an individual also allows them to employ an agent to carry out the inspection effectively. His Lordship stated:

> For the reasons I have given, I think they are directly in point as regards what is to be impliedfrom a permission to inspect. *How much does that permission cover? The decisions are that it covers everything which is necessary to make it effectual.* That is the principle, and those cases cannot be distinguished from the present case by saying that they are company cases and this is a partnership case. They cannot be effectually distinguished except by pointing out some real difference, and the only distinction suggested is that because this is a partnership case the right to inspect by an agent is excluded. *In my opinion that is not a substantial distinction, and if so those cases are direct authority that the permission to a man to do an act, which he cannot do effectually without the help of an agent, carries with it the right to employ an agent.* (Emphasis added.)

[66] The principle to be derived from *Bevan v Webb* is that if an individual is granted a right, such as the right to inspect partnership books, and that right cannot be effectively exercised without the use of certain instruments or means, then the permission to do that thing also implies the right to use the necessary instruments or means. Parliament could not have intended to create a situation where a rightsholder who is incapable of exercising their rights personally is placed in a position of inequality by being denied the use of necessary means to enforce those rights. Collins LJ further stated:

> *If the object is to enable him effectually to make use of the right secured to him, and if that effectual user involves his using some means to that end* — for instance, if he is a near-sighted man, the use of spectacles, or if he cannot see at all and he must make use of another's eyes instead of his own, or if being empowered to take copies of documents he cannot write. having lost his hands, and must use the hands of some one else — I should say that *prima facie the permission to do a thing carries with it the right to use the instrument necessary to prevent that right so conferred from being rendered effective, unless there is anything in the nature of the right or in the relations of the parties from which we are bound to infer that the right must be in some way limited* ... To hold otherwise would amount to saying that, while all the partners ought to be on an equal footing, and ought to have equal opportunities of informing themselves from time to time of the position of the partnership, yet if it should happen that some partner, either from mental infirmity or from want of experience in the particular business, or from physical incapacity. was unable to avail himself of the right personally. he must cease to be on equal terms with the other partners, and be debarred from using the only means by which he could put himself in a position of equality. and gain that information which it is absolutely essential that he should possess. I cannot believe that any Act of Parliament could have been intended to bring about such a result ... (Emphasis added.)

[67] The principles established in *Bevan v Webb*, which granted a partner the right to inspect partnership books through an agent, apply equally to inspection in the context of companies. The rationale for a partner's right to inspect is similar to a director's right to inspect, which is to stay informed about the company's position. The court in *Bevan v Webb* observed that there are no significant distinctions between company and partnership cases regarding the right to inspect through an agent. Collins LJ stated:

> It is said that these cases have no bearing on the present discussion, because they relate to shareholders and statutory enactments ... *[T]hose cases cannot be distinguished from the present case by saying that they are company cases and this is a partnership case*. They cannot be effectually distinguished except by pointing out some real difference, and *the only distinction suggested is that because this is a partnership case the right to inspect by an agent is excluded. In my opinion that is not a substantial distinction, and if so those cases are direct authority that the permission to a man to do an act, which he cannot do effectually without the help of an agent, carries with it the right to employ an agent.* (Emphasis added.)

[68] *Bevan v Webb* was subsequently relied upon and applied in *Edman v Ross*, where the court confirmed this principle and stated that, as a general rule, anything that an individual can do personally can also be done through their agent. It is reasonable to allow a director to use the assistance of a competent agent to fulfill their duties given their fiduciary position. Street CJ stated:

> Having the right then to inspect documents and to take copies, is there anything in the reasons upon which the right rests to suggest that it must be exercised personally? I think not. As Stirling LJ pointed out in *Bevan v Webb* [...] the general rule of law is that whatever a person, who is sui juris, can do personally he can also do through his agent, and reason and *commonsense suggest that in view of the fiduciary position which a director occupies he should be entitled to call in the aid of a competent agent if he considers that skilled assistance is necessary to enable him to discharge his duties*. (Emphasis added.)

[69] *Edman v Ross* was referred and cited with approval by Nazlan J in *Dato' Seri Timor*.

[70] Another example of the courts' readiness to allow the inspection of company documents by an agent is found in *In re Credit Company* (1879) 11 Ch D 256. Here, a managing director opposed a petition for a winding-up order by a shareholder by filing an affidavit that outlined the company's assets and liabilities. The shareholder's solicitor requested to inspect the books and the register of mortgages but was denied access by the company's secretary. The relevant article of the articles of association, similar to the relevant articles of the company defendants, specified that no member could inspect any account or book or document of the company unless authorised by the directors, a general meeting, or as conferred by statute. The court found that the company had

refused to allow the shareholder to inspect the register of mortgages and that there was no ground for the refusal. The court ordered that the shareholder, their solicitor, or agent be allowed to inspect the register of mortgages under the Companies Act 1862.

[71] In this case, the court did not prohibit a member from carrying out an inspection through their solicitors as an authorised representative. Likewise, in the present case, the company defendants' articles of association, which specify who is entitled to inspect records, do not prevent directors from inspecting records through agents, as this does not override the common law position that directors can do so. In particular, article 97 of the first defendant, which is similar to that of the other company defendants, states:

> The directors shall cause proper accounting and other records to be kept and shall distribute copies of balance sheets and other documents as required by the Act, and shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounting and other records of the company or any of them shall be opened to the inspection of members not being directors and no member (not being a director) shall have any right of inspecting any account or book or paper of the company except as conferred by statute or authorised by the directors or by the company in general meeting.

[72] The article in question outlines three categories of people who can inspect the company's records: directors have an automatic right, members (excluding directors) have the right subject to approval, and non-members and non-directors have no right to inspect. The first plaintiff and his agents fall under the first category, as they are inspecting the records on behalf of the first plaintiff and not in a personal capacity.

[73] Here, the first plaintiff not only has the right to appoint an agent, but there is also a significant need for him to do so due to his illiteracy and multiple health issues. The supporting affidavit evidence indicates that he is unable to read or write in English or Bahasa Malaysia, is 80 years old, and is experiencing health and mobility challenges. This underscores the important consideration and objective under the common law position to prevent a right conferred from being rendered ineffectual.

[74] Moreover, it should be noted that there are sufficient measures in place to ensure that the confidential information acquired by the first plaintiff remains secure. The authorised agents have each given an undertaking to this court that any information obtained during the inspection will be kept confidential and will only be disclosed to the first plaintiff and not to any third party.

ORDER OF THE COURT

[75] Based on all the evidence presented, I am not of the view that giving the plaintiffs access to inspect would harm the company defendants. I do not see any valid reasons for why the right to inspection would be misused or cause harm to the companies. Even if there is a possibility of misuse or abuse, the law does not allow the right of inspection to be denied or limited on that basis. The presumption that the inspection by the first plaintiff through his agents is made in the best interest of the company defendants and in proper discharge of the director's duties was not rebutted by the defendants. Even if the first plaintiff derived some advantage from the inspection of the documents of the company defendants that is applied in Suit 112, the right of inspection is not taken away from the first plaintiff. The first plaintiff's rights of inspection can be further exercised through his authorised agents, the second plaintiff, the first plaintff's solicitor and the first plaintiff's appointed auditor. In view of the first plaintiff's infirmity, his right of inspection can only be effectively exercised though his agents which is necessary to enforce those rights.

[76] The injunctive relief sought via prayer 2 in encl 1 is allowed as it is consequential in giving life and efficacy to the right of inspection, and a similar injunction was allowed in *Bevan v Webb*.

[77] As for the documents that can be inspected, these are not limited to only documents or records which are within the purview of ss 48, 55, 57, 245 and 342 of the Companies Act 2016 stated in the intitulement. Following *Dato' Seri Timor* the information and documents which a director is entitled to inspect may be potentially be everything in the records of the company and beyond accounting and other records as envisaged under s 167 of the Companies Act 1965, the precursor to the current s 245.

[78] I find that the plaintiffs have proven their case on a balance of probabilities and this application in encl 1 is allowed with costs of RM25,000 ordered against the company defendants and RM25,000 against the individual defendants. The terms of the relief are as per the plaintiffs' proposed terms in annexure 1 of their submissions in encl 41.

[79] I accept the modifications to original prayers for reliefs in encl 1 as proposed by the plaintiffs in their submissions to enhance specificity:

(a) in prayer [1], a written notice for inspection is required to be issued by the plaintiffs and the documents for inspection must be made available within 3 days of the issuance of such notice;

(b) in prayer [1.1] (iv) and (vi) the solicitor and auditor are to be assisted by subordinates, instead of colleagues; and

(c) in prayer [2] the inspection must be carried out within 15 working days of each notice.

[80] The terms of the relief are set out as below:

1. That all records of each and every of the first to sixth defendants respectively, including the register, minutes book, accounting and other documents/records required to be kept pursuant to the Companies Act 2016, including but not limited to, sections 47, 50, 57, 245 and 341 thereof (whether in physical or electronic form) ('Records') be immediately in any event within 3 working days from the date of a written notice for inspection:-

1.1 open to inspection by the following persons:-

i. first plaintiff; and/or

ii. the second plaintiff (as the first plaintiff's attorney); and/or

iii. Hee Cher Sun, (NRIC No. 720101–10–5510) (Bar Council Membership No. BC/H/295) ('Solicitor HCS'), an advocate and solicitor of the High Court of Malaya practicing in Messrs CS Hee & Co acting for the first plaintiff; and/or

iv. the Solicitor HCS's subordinates from Messrs CS Hee & Co; and/or

v. Chuah Soo Huat, (NRIC No. 750914–14–5461) (Audit License No. 03002/07/2022 J)] ('Auditor'), an approved company auditor and a partner of Messrs Moore Stephens Associates PLT, acting for the first plaintiff; and/or

vi. the Auditor's subordinates from Messrs Moore Stephens Associates PLT

(collectively, 'Authorised Persons'); and

1.2 available for the Authorised Persons to make copies of and/or take extracts from the Records of each and every of the defendants respectively, upon the undertaking in writing given by the second plaintiff, the Solicitor HCS and the Auditor to this Honourable Court that the information acquired by them and/or their colleagues from Messrs CS. Hee & Co and/or Messrs Moore Stephens Associates PLT respectively during the inspection shall not be disclosed by them and/or their colleagues from Messrs CS. Hee & Co and/or Messrs Moore Stephens Associates PLT respectively except to the first plaintiff, as per Annexure A hereto (ie encl 1) and provided always that the terms of the inspection as herein ordered may be implemented and/or carried out within 15 working days in relation to each of the written notice aforesaid.

2. That each and every of the defendants respectively, whether by themselves, their directors, officers, agents, servants, nominees, proxy or otherwise howsoever be restrained and an injunction do issue to restrain each and every of the defendants respectively whether by themselves, their directors, officers, agents, servants, nominees, proxy or otherwise howsoever from preventing and/or obstructing in any manner whatsoever the Authorised Persons from accessing the Records of each and every of the defendants respectively.

Enclosure 1 allowed with costs of RM25,000 to be paid by company defendants and RM25,000 to be paid by individual defendants.

Reported by Dzulqarnain Ab Fatar